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DONALD T. DiFRANCESCO
Acting Governor

JAMES WEINSTEIN
Commissioner

May 18, 2001

U.S. Department of Transportation
Dockets Management Facility
Room PL-401
400 Seventh Street, SW
Washington, DC 20590

RE: Docket #FMCSA-2000-7017: Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles (CMV) Used in Interstate Commerce, Notice of Proposed Rulemaking (NPRM)

Dear Madam/Sir:

The New Jersey Department of Transportation is grateful for the opportunity to comment to the above-cited proposed rulemaking. We timely contacted the FMCSA Office of Bus and Truck Standards and Operations for an extension of time in order to prepare more complete commentary for this rulemaking. We are therefore grateful for your review and thoughtful consideration of these comments in light of the significance of this rulemaking to the public safety and to the states in their carrier safety functions.

The proposed rulemaking would amend the Federal Motor Carrier Safety Regulations (FMCSR), making provision within the definition of Commercial Motor Vehicle (CMV) for certain coverage of specified small passenger carriers. The Congress, USDOT and the FMCSA are to be commended for their attention to the safety of these small commercial passenger vehicles and their efforts for better inclusion of these types of vehicles and operations within the commercial motor vehicle safety programs.

Critical to this endeavor are the definition of vehicles (and their operations) as commercial motor carriers and the scope of regulatory oversight. This is not an easy task in light of the various kinds of vehicles and operations that could potentially be affected.

Underlying the public policy in this area of safety are at least four concerns. The first concern is related to the mixing of larger, heavier and complex vehicles with smaller vehicles on the roads, presenting greater risks of serious personal injury or fatality in the event of collision. This has historically been recognized in trucks and buses and is reflected in the existing definition of CMV in the FMCSR, covering size and weight of vehicles. The second concern, in the context of passenger vehicles, is the greater number of people exposed to potential injury in the event of an accident. The third concern, in the context of "commercial" vehicles, is that the economic incentive to keep revenue vehicles in operations can, at times, be at variance with the paramount need to maintain the safety of those vehicles and their operations. The fourth concern, relating to commercial passenger carriers, is that the public, which is paying for transport services, does not necessarily know who is operating that service, and it is placing its care in the hands of those carriers which generally have been licensed and are regulated by the public's governmental authorities.

The four concerns stated above should be guiding considerations in commercial passenger carrier safety oversight. Since the subject of this rulemaking is smaller commercial passenger carriers, the latter three concerns should be considered in the regulatory definitions and oversight scope that are ultimately chosen. In this regard, we believe that the definitions in the proposed rulemaking do not adequately encompass these public policy considerations and would actually create greater enforcement difficulties. Most notably, the general applicability section of Part 390.3, as proposed, would be amended using a seventy-five air mile test to determine applicability of the relevant regulations. Unfortunately, this excludes certain interstate carriers from the ambit of the relevant regulations, based on a statistical analysis of accidents, while including those that are long distance carriers only.

The aforementioned underlying public policy considerations are thereby not met in the proposal regarding the interstate carriers operating less than seventy-five air miles. Serious accidents can and do occur on shorter trips, often more related to the mix and speed of traffic than the distance covered on typical trips. Also, these vehicles are often operated in mixed use: they may be on short routes one day and longer charters the next, presenting regulatory and enforcement dilemmas in categorizing them for application of the law. Experience has also shown that short distance routes are not necessarily operated more safely; excessive hours of service on short repetitive routes can be just as dangerous as on longer distance trips. The seventy-five air mile rule creates a distinction between federally authorized interstate carriers that will likely not be apparent to the travelling public, who rely on the licensing authority to review properly the carrier's safety fitness. It is not wise for the government to certificate and license commercial carriers, set them in motion, and then distinguish them for certain safety oversight based upon distance of travel. Whether short or long routes, there is still the concern that revenue vehicles may be retained in service for economic reasons when they should be out-of-service for repair. Indeed, our experience with small vehicle interstate operators is that they are often operated on an individual basis under the umbrella of a federally certificated carrier through a leasing arrangement. Thus, individuals each bring a vehicle to the carrier, operate it under the carrier's federal certificate, and usually have only one vehicle each at their disposal. There is an inherent economic disincentive for that individual to take that vehicle out-of-service for repair. These carriers (more correctly viewed as an association of individual owner-operators) usually require greater safety oversight, not less, because of the economics of their operations. Further, NHTSA recently identified many of the van models that are typically seen in such commercial service as having significant roll over problems when fully loaded. It is very important that federally-

authorized commercial passenger services, regardless of the distance of the trip, receive similar levels of safety scrutiny in their operations.

Enforcement of passenger motor carrier safety, with respect to federally-authorized interstate carriers, is also made more difficult by the proposal. Motor carrier enforcement historically has been dependent upon proper identification of a vehicle and carrier. By introducing some federal carriers that are covered by relevant rules and others that are not so covered, enforcement officials do not have a clear identification of which is which. They are presented with an additional fact that is not readily discernable without additional, perhaps difficult, fact finding on the nature of the distance of such operations. Enforcement is thereby inadvertently eroded, as has been seen in other contexts in recent years (state license plating controls over motor carriers are lost by the preemption of IRP, state regulatory certification of charter bus services has been largely preempted by recent federal law, distinctions between interstate and intrastate services have become problematic in regulatory enforcement, etc.).

Because of the deregulation and preemption provisions in federal law over the years, state and local officials are left with less authority with respect to passenger motor carriers. Concurrently, we have seen a significant increase in small passenger commercial operators, to a large extent traceable to the federal Bus Reform Act of 1982, the federal Immigration Reform and Control Act of 1986, and subsequent federal legislation. The “van phenomenon” has been experienced especially in those areas of the country where there are large immigrant communities, and, in our instance, where there are close-by state borders that introduce preemptive federal interstate operating authority for these services. These operators do provide useful transport services for the community, but there has been concern over safety compliance by the ease of carrier entry and the marginal economics of the operations. It is most important that FMCSA, in this rulemaking and other related rulemakings, consider the disconnect between carrier operating authority/certification and carrier safety/fitness. The seventy-five air mile provision is an example of a further disconnection between the carrier’s operating authority and its safety/fitness. The operating authority should have meaning other than insurance filing compliance; the public should be able to trust that the operator’s federal and/or state operating authority/certification is directly linked to the carrier’s overall fitness. Having federally certificated carriers under different safety regimes, without valid distinctions, only furthers to disconnect safety from the carrier’s certification. The tragedy of an interstate bus that crashed in Vernon, NJ a number of years ago has taught the need to keep the licensing and safety functions together in one agency and to keep a direct connection between the two.

Regarding the scope of application for the proposed rulemaking, it should relate to “for-hire” commercial passenger carriers, consistent with the four points earlier stated. This is the traditional approach taken, and has been reflected in state and federal law. Introducing a new concept of “direct compensation” does not appear necessary if “for-hire” is properly defined. It is agreed that certain types of operations are not for-hire and should be excluded from the scope of the rule (funeral vehicles, free courtesy shuttles, ancillary transport services for nursing homes, etc.), since they do not introduce revenue vehicles which are integral to the primary business activity in the commercial transportation of people. Specific exclusions for such vehicles may be stated and a test for the free courtesy shuttles should be clearly stated. The test of a true courtesy shuttle would be that it is free to anyone, regardless of whether an individual will be paying for a service (staying at a hotel, leasing a car at the airport, residing at the nursing home, receiving services at a hospital, etc.), to which the shuttle is ancillary or incidental. Also, it is noted that there are public “community” shuttle services, operated by counties, municipalities and non-

profit organizations, which may or may not charge a fee, that provide transportation as part of social service programs. Indeed, some county and veteran shuttles are known to operate interstate, thus FMCSA is asked to consider whether a specific exclusion is appropriate for such types of services. Though the operation of any vehicle, public or private, commercial or non-commercial, for-hire or not-for-hire, has the potential for safety concerns, it is best for the government to focus particular attention, under the heightened scrutiny of commercial motor carrier law, to the safety of for-hire or revenue vehicles (and carriers). Such vehicles are integral to a commercial transportation enterprise, and there is the need to assure that the economics associated with keeping revenue vehicles in service does not prevail over the safety in the proper maintenance and operation of those vehicles.

The proposed “direct compensation” definition can raise additional regulatory and enforcement issues. For example, experience has shown that smaller vehicles (vans) are typically engaged by, or even operated by, temporary employment agencies to transport low-income workers to employment sites, for fees that are not always paid in a direct manner (sometimes taken out of paychecks later). These vehicles are treated under the traditional view as for-hire, though there is a need to investigate the method of compensation, which at times is not quite “direct”, or which might be considered part of the temporary employment “package”. Experience has shown us, and our state labor law acknowledges, the need to treat these as motor carriers, and to enforce the appropriate safety regulations for the protection of such vulnerable workers.

Recognizing that the federal government and the states have differing definitions in their respective laws and regulations governing smaller commercial passenger vehicles, the practicality of seeking uniformity in this area within the short timeframe contemplated by the notice of proposed rulemaking is raised. Amending laws at the state level takes a considerable period of time. Further, application of interstate regulations to wholly intrastate operations should not be done through this rulemaking process; the states should have an active role in overseeing the safety of such operations solely within their own borders. Likewise, it would be most inappropriate to condition participation of the states in funding under the federal Motor Carrier Safety Assistance Program (MCSAP), to their institution of changes in their laws. The states are very important to safety regulation, inspection and enforcement of passenger motor carriers (interstate and intrastate) under the federal-state relationship that has evolved. Such a pre-condition for participation in the MCSAP program would run contrary to the interests of public safety. We disagree with the Federalism Assessment under E.O. 13132 that is set forth in this Notice of Proposed Rulemaking (*Federal Register*, Vol. 66, No. 8, p. 2779), in that this rulemaking does have significant federalism implications and does present additional costs and burdens on the states.

Exemplifying concern for public safety with respect to these smaller commercial passenger vehicles and the need to assess the federalism implications of regulatory and enforcement authority over interstate operators of these vehicles, is a bill that was introduced in the 106th Congress, H.R. 2775. This bill sought to enact a “Safe and Efficient Passenger Van Act”. Further, we understand that there is a study underway at the Federal Motor Carrier Safety Administration regarding such van operations. We have previously mentioned the study by the National Highway Traffic Safety Administration regarding safety concerns associated with certain vans typically used in commercial passenger operations. Additionally, a study is now underway at the Federal Transit Administration on bus safety oversight, which is involving the states in defining the scope of bus safety oversight. We believe that this rulemaking endeavor would benefit from the results of these reviews and also from an extensive consultation with the

various states and territories, which are directly involved as key partners in implementing safety oversight, regulation, inspection and enforcement for commercial passenger motor carriers.

This rulemaking is clearly an important and needed undertaking, which has significant federalism implications. It is most important that this undertaking be made with active involvement of the state and territorial governments. We suggest that FMCSA consider a method of consultation with the states and territories, so that resulting regulations have the benefit of regulatory and enforcement insights from the states. Indeed, such an approach presents an opportunity to convene all jurisdictions to review overall commercial vehicle safety and carrier fitness oversight, harmonization of laws and regulations, definitions and scope of oversight regarding vehicle types, new transport services that have evolved, school vehicle safety, enforcement needs, regulatory certification and decertification of carriers, and, of course, smaller passenger commercial vehicle operations.

Thank you for your kind consideration of the aforementioned comments, and for the opportunity to participate in this important effort for the public safety.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Albert B. Ari', written over the typed name.

Albert B. Ari
Deputy Commissioner